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IN THE
SUPREME COURT OF THE
UNITED STATES
October Term, 1970

NO. ~~1257~~

JIMMY SAVILLE and
RITA ANN GUARRASI,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPINION BELOW

Petitioners, Jimmy Saville and Rita Ann Guarrasi, hereby apply for writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review the judgment rendered by said Court in the above entitled

cause. The opinion of the Court of Appeals herein is appended hereto and designated as Appendix "A" to this petition.

JURISDICTION

The judgment of the Court of Appeals i the instant matter was entered December 21, 1970. No petition for rehearing was filed therein. The jurisdiction of this Honorable Court is invoked pursuant to the provisions of Title 28, U.S.C. §1254(1).

NATURE OF PROCEEDINGS

The instant case concerns the subject of border searches and in particular the requisite predicate for a strip-search by United States Customs Officers of persons crossing the international border into the United States. No decision of this Honorable Court pertinent to this inquiry appears to have been rendered. Decisions of the Courts of Appeal respecting this subject include, inter alia, Henderson v. United States, 390 F.2d 805 (9th Cir. 1967); Huguez v. United States, 406 F.2d 366 (9th Cir. 1968); United States v. Guadalupe-Garza, 421 F.2d 876 (9th Cir.

1970); and United States v. Johnson, 425 F.2d 630 (9th Cir. 1970).

QUESTION PRESENTED

The question raised by the present proceedings is whether a person entering the United States across an international border may be subjected by customs officials to a strip-search involving the removal of all clothing solely because such person appears nervous to a customs officer upon routine border questioning.

REASONS FOR HEARING

A writ of certiorari should be issued by this Court and a hearing granted herein for the following reasons:

(1) The subject matter of the present case is one of nationwide regard and a single standard of application to govern customs officials at all border stations is accordingly required.

(2) The decision of the Court of Appeals herein is contrary to other decisions of said Court respecting the same subject of inquiry, and a decision of this Court is therefore needed to

assure uniformity of result in the Court of Appeals and to provide controlling precedent therein.

(3) A decision of this Court is necessary in the instant matter to affirm the dignity of the individual against serious personal encroachments predicated solely on the ambivalent character of nervous appearance.

(4) A decision of this Court is required to accord petitioners herein the proper protection provided by the Fourth Amendment to the Constitution of the United States against unreasonable searches and seizures.

STATEMENT OF CASE

A.

PROCEDURAL BACKGROUND

Petitioners were jointly charged by Indictment No. 6554, filed July 16, 1969, in the United States District Court for the Southern District of California, with a violation of Title 21, U.S.C. §174 (unlawful importation of heroin and cocaine), allegedly occurring June

18, 1969 (C.T. p. 1).

A motion to suppress the physical evidence subject of the above charge, and the evidentiary fruits thereof, including statements of petitioners, was heard October 2, 1969 and taken under submission by the trial court (C.T. pp. 8, 18, 33; R.T. pp. 4, 74). On October 3, 1969, the court entered its order denying the said motion for suppression of evidence (C.T. p. 37).

Petitioners thereafter, on November 26, 1969, waived trial by jury in the instant case and stipulated that the matter could be determined by the trial court on the evidence adduced at the hearing of the motion to suppress evidence (C.T. pp. 38-40). The same date the court found petitioners each guilty as charged in the Indictment (C.T. p. 40).

Petitioners appeared for sentencing January 19, 1970, at which time petitioner Jimmy Saville was sentenced to a term of imprisonment for a period of five years, and petitioner Rita Ann

Guarrasi was committed pursuant to the provisions of the Youth Corrections Act (C.T. pp. 44-46).

Notices of Appeal were thereupon timely filed by petitioners (C.T. pp. 47-48), and the matter was adjudicated by the Court of Appeals for the Ninth Circuit which affirmed the judgments rendered by the trial court. Petitioners now seek review by this Court for the reasons hereinabove expressed. Petitioners have remained at liberty on bail during the pendency of the instant appeal.

B.

MOTION TO SUPPRESS

The proceedings held in connection with petitioners' motion for suppression of evidence are contained in the Reporter's Transcript dated October 2, 1969. Evidentiary references below thus pertain to such transcript which has been filed as part of the designated record on appeal.

Glenn Ray Burow was called first as a witness by the Government. He testified that he was a customs inspector and had been so engaged for three and one-half years, the last six months on assignment at the San Ysidro Port of Entry.

On June 18, 1969, at about 4:00 (P.M), he observed petitioners entering the United States from Mexico in an automobile. At that time he was performing primary screening inspection of vehicle traffic entering the United States (R.T. pp. 5-7).

Burow asked petitioners as they approached his position their nationality and citizenship and if they had acquired merchandise in Mexico. Petitioners replied they were United States citizens and stated they had purchased souvenirs of small value, between ten and fifteen dollars, while abroad. Burow then asked petitioner Saville, who was the driver of petitioners' automobile, to step from the vehicle and open the the trunk. Saville did so and was "quite cooperative" but

also appeared to Burow to be "somewhat nervous" (R.T. pp. 7-8).

Burow examined the trunk of the car and then returned to the occupants' portion to inspect the glove compartment. After examining the glove box, he asked petitioner Guarrasi her age and to show him her identification. Guarrasi presented her identification but had a difficult time extracting it and appeared to Burow to be "extremely nervous" at this time (R.T. p. 8).

Burow then decided to complete the search of petitioners in the secondary area and directed their vehicle to that location. He described Saville's nervousness up to this point as consisting of difficulty with handling his keys and keeping his hands steady and a hesitation in one or two answers to routine questioning. However, he did not consider Saville's speech to be nervous and recalled his answers to be "quick". He described Guarrasi's nervousness to consist of her difficulty in extracting her identification

from her pocketbook and a hesitation in answering questions in that she paused after starting her reply and then continued her answer after a hesitation (R.T. pp. 8-9).

After arriving at the secondary area Burow conducted a weapons search of petitioners and called for a matron to make a full search of Guarrasi. While waiting for the arrival of the matron, Burow made a further search of petitioners' vehicle, having petitioners under the supervision of an office inspector. Upon his return to the office, Burow was apprised that Guarrasi was in a search room with a customs inspectress. After about 30 minutes (according to Burow, a normal routine female search takes about 15 minutes), Burow asked his supervisor if they should then proceed to take Saville into a search room for a complete search, and the supervisor assented. In the search room Saville was told to take everything from his pockets and then remove one item of clothing at a time. Saville complied

down to his jock strap and then stated he did not want to remove that item. Burow told him it would be necessary for him to take off his jock strap, and Saville finally lowered it to his thighs, removed two contraceptives, and handed them to Burow. Saville was then allowed to dress and was taken to a small room. At this time Guarrasi was sitting in the secondary office crying hysterically (R.T. 9-11).

Burow learned from the matron at this time that Guarrasi refused to be completely searched and would not remove her panties. Burow then told Guarrasi that it was necessary for her to be searched and that if she wouldn't cooperate she would be taken to the county hospital or jail to be searched. Guarrasi continued to cry, and Saville then called out loudly from the room where he was placed that "It was all his fault, he was sorry, Guarrasi's parents would be very angry at him, and that she should give the officers what they wanted". Burow had further conversation with

Guarrasi, and she then agreed to cooperate in a search and returned to the search room with the matron. Within five minutes the matron returned with three contraceptives which she stated Guarrasi had removed from her panties (R.T. pp. 13-15).

Burow tested the contents of the two contraceptives obtained from Saville after removing him from the search room and placing him in a small room near the secondary office, and found one to be positive for cocaine and the other positive for heroin (R.T. p. 11). He further tested the contents of the three contraceptives the matron obtained from Guarrasi and found each to be positive for heroin (R.T. p. 15).

On cross-examination Burow testified that he had no arrest or search warrant respecting petitioners or their vehicle, that he had no information regarding them, and that he did not know and had never seen them prior to June 18, 1969 (R.T. p. 16); that Saville appeared to understand and

answer intelligently the questions asked him (R.T. p. 17); and that one of the observations noted by him (although not affecting his judgment in the matter) was that Saville was a male Negro and Guarrasi a female Caucasian (R.T. p. 18).

Burow further testified that nervousness on the part of a person entering the country was not necessarily the most relevant factor in his determining to make a skin search, and that with respect to Saville, in addition to the nervous appearance noted, he "just had an uncanny feeling about the whole thing, and that's all I can tell you", which induced him to cause petitioners to be strip searched (R.T. pp. 19-20). The time taken in the search of Guarrasi was not a factor in causing Burow to strip search Saville; this search was routine for men and women taken to the secondary area -(see pp. 31-32), and Saville was to be searched regardless of the search involving Guarrasi, except that Burow had not gotten ready to search Saville until the time he did (R.T. pp. 22-23).

Except for the foregoing, there were no other factors that induced Burow to make the search in question (R.T. p. 23).

During the strip search of Saville, another officer was present with Burow in the search room (R.T. p. 37). Saville did not want to remove his jock strap at this time and so expressed himself. Burow then told him he had to remove the item but that it was up to him how he wanted it done and that if he did not do it personally it would be done for him. At this point Saville pulled down his jock strap, exposing his sex organs in the process, and handed Burow the two contraceptives (R.T. pp. 23-24).

With respect to Guarrasi, Burow asked her her age and residence while at the primary check point, and she hesitated before answering both questions. He then asked her for identification, and she had difficulty steadying her hands to remove her identification. In addition, Burow observed a prominent vein around Guarrasi's throat beating rapidly indicating to him that her heart was pumping rapidly. The foregoing

constituted the manifestations of nervousness on Guarrasi's part noted by Burow at the initial inquiry - which then caused him to take petitioners to the secondary station for further search (R.T. pp. 25-29).

Burow's "uncanny feeling" concerning petitioners and their situation did not develop until after he brought petitioners to the secondary station and commenced a pocket search of them. At this time they continued to be nervous, and Saville appeared to become more nervous at this stage. The "uncanny feeling" then developed out of this continued nervousness on petitioners' part, however, the skin search was based not on this feeling alone but mostly on the nervousness which was exhibited. It was, according to Burow, routine, with few exceptions, to skin search persons taken to the secondary area as petitioners had been (R.T. pp. 29-33).

The foregoing concluded the testimony of Mr. Burow and was the only

evidence offered by the Government on the issue of search and seizure raised by petitioners' motion to suppress evidence. Further testimony was given by customs agent David R. Smith to the effect that petitioners were each separately questioned by him regarding the contraband recovered from them and each voluntarily, after full admonition of rights, admitted knowing involvement in the unlawful importation of the same into the United States (R.T. pp. 39-55).

Testimony was also given by petitioner Saville on the search and seizure issue; however, the same will not be detailed here because of the specific finding of the trial court that the testimony of the Government witnesses in the instant matter was true and conflicting testimony of Saville untrue (C.T. p. 37). The search and seizure issue presented thus was resolved and determined by the trial court on the basis of Burow's testimony, and accordingly the same has been developed and presented in careful detail herein.

C.

DECISION RENDERED

The trial court in the instant case framed the basic inquiry at the hearing of petitioners' motion for suppression of evidence as follows:

> "If the skin examination of the defendant Saville is improper, then I would think the examination of the defendant Guarrasi would be improper, and that then would exclude statements which I think were based upon the fact that they found illegal contraband. If the contraband was was discovered illegally there would be nothing to talk about and the statements, I think, should go, too." (R.T. p. 74, lines 11-18.)

Respecting this inquiry, the trial court concluded from the testimony of customs agent Burow that "the apparent nervousness of both defendants when first questioned, together with the increased nervousness observed as the investigation progressed, was sufficient to support

the suspicion of the officer, to which he testified, to the extent that a skin search was justified" (C.T. p. 37, lines 19-24).

PETITIONERS' POSITION

Petitioners respectfully submit that the foregoing determination of the trial court herein, concurred in and affirmed by the Court of Appeals in its judgment below, misconstrues the applicable precedent authorities, and that the nervousness on the part of petitioners as observed and described by agent Burow does not, nor as a policy matter should it alone suffice to support and justify the strip search of their persons conducted in the instant case. Accordingly, petitioners contend the evidence thereby discovered was improperly acquired by the Government and the same should therefore have been suppressed on their motion for suppression of evidence and not received in the trial of the case.

ARGUMENT

Three successive types or degrees of border search situations present themselves for consideration as reflected by decisions heretofore rendered by the United States Court of Appeals for the Ninth Circuit. These situations warrant brief analysis at this time. Thus, as expressed in Henderson v. United States, 390 F.2d 805 (9th Cir. 1967) and Huguez v. United States, 406 F.2d 366 (9th Cir. 1968), searches at the border may be of a person's baggage, vehicle, purse, wallet, or bags; or they may be naked strip and skin searches of a person; or they may be inspection of and examination into a person's body cavities.

Each category of search described above progressively involves a greater intrusion on the privacy, and dignity, of the individual, and accordingly the decisions cited require a corresponding increasing evidentiary justification (in all instances, however, less than probable cause to arrest) to support the more extensive personal searches indicated. Thus, the property search

at the border is justified by the mere fact that the person searched is crossing the border and entering the country. The strip search, however, requires a real suspicion to be directed specifically to the person searched in order to be justified, and the body cavity search in addition requires a clear indication or plain suggestion of narcotics smuggling or concealment for justification. Henderson v. United States, supra; Huguez v. United States, supra.

The instant case involves the second class of search, the strip search, for which a real suspicion must be directed to the person to be searched in such manner. However, "real suspicion", as used in this connection, signifies more than mere subjective apprehension or concern regarding a situation. As expressed by the Court of Appeals in United States v. Guadalupe-Garza, 421 F.2d 876 (9th Cir. 1970), at p. 879:

> "'Real suspicion' justifying the initiation of a strip

search is subjective suspicion supported by objective, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a particular person seeking to cross our border is concealing something on his body for purpose of transporting it into the United States contrary to law."

Moreover, respecting this matter, the Court in Guadalupe-Garza, stated further at p. 879:

"The objective, articulable facts must bear some reasonable relationship to suspicion that something is concealed on the body of the person to be searched; otherwise, the scope of the search is not related to the justification for its initiation, as it must be to meet the reasonableness standard of the Fourth Amendment. [Cases cited.]."

In the instant case the objective, articulable facts indicated by agent Burow as the basis for his suspicion toward petitioners, as reflected by the record and found by the trial court, consists solely of petitioners' varying degrees of nervousness, exhibited initially at the primary check point and afterward at the secondary office (although it appears from Burow's testimony that routinely, with rare exception, all persons taken to the secondary area are strip searched and accordingly petitioners' nervousness at this stage would not appear to be a determining factor in the search conducted in the case). The issue thus presented by the case at bar is whether a person's exhibition of symptoms of nervousness when crossing the border into the United States "bears . . . reasonable relationship to suspicion that something is concealed on the body of [such] person" so that the person may then, whether man or woman, and irrespective of age, be compelled to submit to a strip

search involving the total removal of clothing before a stranger, albeit one of the same sex, or whether some circumstance of more tangible and specific character is required to support such intrusion on the individual's personal privacy and dignity.

Respecting this issue several decisions of the Court of Appeals appear pertinent and require more detailed comment. These decisions have considered the nature and adequacy of the underlying evidentiary basis for a border strip search, and in none has nervousness alone been recognized as sufficient in such regard. Moreover, in one such case, United States v. Guadalupe-Garza, supra, an express rejection of nervousness as the sole predicate for a strip search was made by the Court. It was thus stated in Guadalupe-Garza:

> "The objective facts articulated . . . to justify . . . initiating and conducting the strip search were

these: When appellant was about five feet from [the agent] in the pedestrian lane, appellant 'tilted his head' and 'shied away'. Appellant appeared nervous when . . . asked routine questions . . . There was no evidence that appellant appeared to be under the influence of drugs . . . [and] customs officials had no information about him before he was searched.

"We conclude that the objective facts did not warrant a real suspicion that appellant was concealing something on his person. [The agent] had a hunch about appellant based on appellant's skittish demeanor as he was passing through customs. The fact that . . . later [the] hunch was confirmed does not change a hunch into the real suspicion required to sustain a strip search." 421 F.2d at pp. 879-880.

Similarly, in the case at bar, subsequent confirmation of agent Burow's "uncanny feeling" cannot elevate it into the requisite real suspicion to sustain a strip search. To hold otherwise, it is submitted, would subject any individual who was nervous for any reason, because late in returning home, or because of unpleasant news received, or because of problems awaiting to be faced, or because of worry or regret over past matters, or because of illness or injury, or simply because of an anxious or troubled nature, upon crossing the border, to be stripped and searched by a customs officer who had, perhaps, an unexpressable, strange feeling about such nervousness. The Court in Guadalupe-Garza recognized the untenable character of such a basis for a strip search and rejected it. Nervousness may be occasioned by innumerable reasons totally unrelated to criminal conduct and does not, therefore, "bear reasonable relationship to suspicion that something is

concealed on the body of the person" exhibiting the nervousness.

In addition, an examination of other decisions of the Court of Appeals will reflect the more definitive nature of the evidentiary base required in order to sustain a strip search and thus to constitute the objective facts sufficient to establish real suspicion toward a person. In Henderson v. United States, supra, the defendant and her companion were stopped and subjected to a naked strip and body cavity search on the basis of the customs agent's belief that on a prior occasion he had stopped the defendant at the border and caused her to be searched, revealing a gun, drugs, and a marijuana cigarette in her purse. Holding the foregoing to be insufficient to meet the "plain suggestion" or "clear indication" test required for a body cavity search, the Court noted that at most such evidence gave rise to a real suspicion which might then support a naked strip search. Similarly, in Huguez v. United States,

supra, where the customs agent had become suspicious that the defendant and his companion were under the influence of narcotics when he observed their eyes to be glassy and pinpointed, the Court opined that such evidence might qualify as a sufficient basis for a strip naked and clothing examination search since it probably constituted real suspicion directed toward the two men. In Witt v. United States, 287 F.2d 389 (9th Cir. 1961), information had been received from reliable sources concerning narcotic activities involving the vehicle the defendant was in when crossing the border. The court determined such information to be sufficient to support the suspicion required to search the defendant's clothing and the consequent discovery of contraband in her brassiere, a view similarly suggested by the Court in Morales v. United States, 406 F.2d 1298 (9th Cir. 1968), where like information was held not to constitute the requisite clear indication of narcotics smuggling to

sustain a body cavity search but was considered only to direct suspicion toward the defendant.

In each of the cited cases, it should be observed, a specific, objective, and articulable basis for suspecting narcotics concealment by the defendant existed, which basis was substantially and directly related to the suspicion generated, and in none were grounds as tenuous, indefinite, and ambivalent as the symptoms of nervousness relied on in the instant case even suggested to be sufficient in this regard. In effect these decisions reflect the character of the evidence properly supportive of strip searches which gives rise to the requisite real suspicion to sustain such a search. Important in this respect is information received about the person entering the country relative to possible narcotic implication, observation of the condition of the person indicative of narcotic usage, and good faith belief respecting prior contact with the person involving narcotic concealment.

From such circumstances real suspicion as contrasted with feelings and hunches may arise directed to the particular individual subject of the information or observation or prior contact. Based on such suspicion, a strip naked search may then be validly undertaken. The one case, however, where these factors, or comparable ones of tangible quality, were absent, and where instead nervousness and skittish demeanor were sought to be relied on to support a strip search, the Court unanimously ruled against the propriety of the search.

It would appear from the foregoing discussion that the law in the area under consideration is well established and that accordingly a pronouncement thereon by this Court is unnecessary. Such, however, is not the situation for the reason that the Court of Appeals in its decision below, although citing Guadalupe-Garza with apparent approval, ignores completely the essence of the holding of that case and creates a clear factual conflict with it. This conflict leaves open and unresolved the very

important question raised in the instant case and will accordingly leave persons crossing the border, as well as customs officers at border stations, without certain guides for determining the propriety of strip searches where nervousness alone is the predicate for any suspicions on the part of the customs officer and the basis, therefore, for any search undertaken.

The problem is further complicated by the position recently advanced by the Government in the case of United States v. Johnson, 425 F.2d 630 (9th Cir. 1970), to the effect that no objective basis need be articulated to support an experienced customs officer's suspicion to justify a strip search at the border so long as the officer acts in good faith and is subjectively suspicious of the person searched for some unexpressed reason. Moreover, this view, currently sought to be urged before this Court by the Government on a petition for writ of certiorari in Johnson (United States v. Johnson, October Term, 1970, No. 577), was approved by one of the Justices on the

Court of Appeals panel in the instant case who also sat and dissented from the majority decision in Johnson. (Additionally, it might be noted, a member of the panel determining the appeal in the Henderson case.) Accordingly, these several factors in combination, coupled with the manifest disregard in the decision below of the determination made in Guadalupe-Garza respecting nervousness as an insufficient predicate for a strip search of a person crossing the border into the United States, present considerable uncertainty as to the current state of the law in the area under inquiry. This area, as earlier observed, is one of national scope, and its governing precepts should not be without definitive determination. Accordingly, a review of the instant matter by this Court and a resolution of the issues raised is called for and urgently needed.

CONCLUSION

The Fourth Amendment protection against unreasonable searches and seizures, being a personal guarantee and not an incident of location, necessarily extends to persons crossing the national borders as well as persons crossing the nation's streets. In either context, therefore, official action must meet the standard of reasonableness. Reasonableness is itself a function of and determined by the balancing of interests, on the one hand the need for the Government to make the particular search and on the other the extent of personal invasion occasioned by the search. Unquestionably, a strip search is a considerable personal invasion and one not anticipated by the traveler crossing the nation's boundaries, the mere prospect of which might itself heighten nervousness in a person of ordinary sensitivity. An interesting circular process could well develop in such circumstance leading to clearly unreasonable consequences.

The concept of objective, articulable facts being requisite to personal invasions short of arrest (and therefore, of course, to arrests as well) was enunciated and applied by this Court to on-the-street weapons searches in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Weapons searches involve a character of personal invasion considerably less extensive and oppressive, it is submitted, than do strip searches. An officer could not conduct a weapons search of a person solely because the person appeared nervous to him without completely emasculating the objective, articulable standard concept of Terry v. Ohio, supra. Similarly, then, the more onerous imposition on the personal privacy of the individual consequent on his being compelled to remove all his clothing and strip naked must require a firmer foundation than nervousness alone. Sound constitutional policy and regard for the dignity of the person warrant no less.

APPLICATION

It is thus respectfully requested, on the basis of the arguments presented and the authorities cited hereinabove, that the within petition for writ of certiorari be granted and the matter set for hearing on this Honorable Court's docket.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JIMMY SAVILLE,
Defendant-Appellant.

No. 25,799

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

RITA ANN GUARRASI,
Defendant-Appellee.

No. 25,804

[December 21, 1970]

Appeal from the United States District Court
for the Southern District of California

Before: CHAMBERS and DUNIWAY, Circuit Judges, and BYRNE, District Judge*

PER CURIAM:

Appellants crossed the border from Mexico to the United States. Each was subjected to a strip search; neither was subjected to a body cavity examination or search. Saville had narcotics concealed in his jockey strap; Guarrasi had narcotics concealed in her panties. Our examination of the record persuades us that in this case the customs agent's subjective suspicion was "supported by objective,

*Honorable William M. Byrne, United States District Judge, Central District of California, sitting by designation.

articulable facts that would reasonably lead an experienced, prudent customs official to suspect" that each of them was "concealing something on his [her] body for the purpose of transporting it into the United States contrary to law." *United States v. Guadalupe-Garza*, 9 Cir., 1970, 421 F.2d 876, 879.

Affirmed.

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